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In The

Supreme Court of the United States

October Term, 1988

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

v.

HARRIS N. MURABAYASHI, MIWAKO S. MURABAYASHI, WILLIAM H. EBINA, and BETSY S. EBINA,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents cannot agree with petitioner's characterizations of the questions presented because, as will be discussed hereinbelow, those characterizations do not accurately and completely reflect the proceedings in the courts below. Accordingly, respondents submit that the question presented is as follows:

1. Whether a federal court of appeals on a second appeal from summary judgment involving the construction of ambiguous documents drafted by the moving party may construe those documents in favor of the non-moving party after the moving party has had the opportunity but fails to establish its proposed interpretation of those documents by extrinsic evidence.

LIST OF PARTIES

All of the parties are named in the caption. Durine Chiyo Kanai, named as a respondent in the petition, withdrew as a prospective class representative by stipulation of the parties and order thereon filed on April 8, 1986. The named respondents brought their action as a class action on behalf of all similarly situated borrowers. By order filed May 6, 1983 (Resp.App.1) a class was certified as to Count IV of the first amended complaint but subsequently dissolved by order dated September 7, 1983. (Pet.App.B.)

Rule 28.1 is inapplicable to respondents.

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On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

This case involves the construction of ambiguous language contained in form promissory notes and mortgages drafted by petitioner Honolulu Federal Savings and Loan Association (HonFed) and executed by respondent borrowers in connection with their home loans. Respondents have consistently contended since filing their complaint in 1981 that under the language of these loan documents the maximum permissible increase in the interest rates on the loans was 1.5% during the term of

the loans. Petitioner's initial motion for summary judgment on the ground that interest increases were not so limited was granted by the District Court in 1982, the court holding that HonFed was permitted to raise the interest by 1.5% every three months, or 6% a year. (Petition, p. 6, Pet.App.A, 7a; Pet.App.B, 14a-15a) In 1984, the Court of Appeals reversed the summary judgment in HonFed's favor holding that the note and mortgage had to be construed together, that the language of the mortgage was ambiguous and under Hawaii law should be construed against the drafter but that the parties should be allowed to present extrinsic evidence to establish the meaning of the home loan agreements. Upon remand the parties conducted discovery directed toward the construction of the document terms. Contrary to the District Court's previous holding, two officials of HonFed testified that HonFed could raise the interest by 1.5% only *once* a year. (Pet.App.D, 28a) Nevertheless, the District Court again granted summary judgment in HonFed's favor. Respondents again appealed and another panel of the Court of Appeals again reversed noting that the testimony of HonFed's officials showed an understanding of the note that was contrary to its plain meaning. (Pet.App.D, 29a) Accordingly, the court held that "the note read together with the mortgage was ambiguous," that the ambiguity is construed against the drafter and, as respondents had contended for some seven years, that the maximum permissible increase in interest was a raise of 1.5% during the life of the loans.

The court's decision was not based upon any "new theory" as HonFed contends but on established principles of Hawaii law applicable to the construction of notes

and mortgages. HonFed was given ample opportunity to resolve the ambiguity appearing in its own documents and it suggests nothing either factual or legal that was not before the Ninth Circuit. Accordingly, respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the unpublished judgment and opinion of the Ninth Circuit Court of Appeals filed on June 3, 1988.

OPINIONS BELOW

In addition to the opinions attached to the petition, there is attached hereto as Appendix 1 the unreported May 6, 1983 opinion of the District Court granting respondents' motion for summary judgment as to Count IV, certifying the plaintiff class with respect thereto, awarding costs and attorney's fees, and granting petitioner's motion for summary judgment as to Count V. (Upon petitioner's motion for reconsideration, the District Court in its order of September 7, 1983 [Pet.App.B, 9a-12a] vacated its May 6, 1983 order as it related to Count IV, granted petitioner summary judgment thereon, and dissolved the class.)

STATEMENT OF THE CASE

Respondents are borrowers from HonFed who in the period 1964-1965 executed pre-printed form promissory notes and mortgages prepared by HonFed. A typical note provided for an interest rate of 6.5% and contained the following clause:

> "IT IS HEREBY FURTHER AGREED that the holder, at any time after (3) years from the date of this note, and from time to time thereafter, may upon not less than three (3) months' written notice to the undersigned, decrease or increase the interest rate then in effect by not more than one and one-half percent (1-1/2%) per annum. . . . "

The contemporaneously executed mortgages, however, provided in pertinent part as follows:

> "IT IS FURTHER AGREED that the Mortgagee may at any time after (3) years from the date of said note hereby secured, and from time to time thereafter, decrease or increase the rate of interest *on said note* by not more than one and one-half percent (1-1/2%) per annum. . . . " (Emphasis supplied)

In 1974 HonFed raised the interest rate by 1-1/2 percent. In 1981 HonFed notified its borrowers that it was raising the interest rate another 1% whereupon respondents filed their original complaint in November 1981 alleging among other things, that the provisions meant that the maximum permissible increase in the interest rate was 1-1/2% over the term of the notes.[1]

On April 27, 1982 HonFed filed its motion to dismiss Counts II and III and for summary judgment on Count I.

---

[1] Count I of the complaint and amended complaint sought declaratory relief on this basis. Counts II and III sought relief under Hawaii law for fraudulent concealment and incomplete disclosure. Count IV sought relief under the federal Truth-In-Lending Act and Count V sought relief under Hawaii's Unfair Trade Practices Act. Counts II and III were dismissed on limitations grounds and are no longer in issue.

In its supporting memorandum HonFed recognized the central issue in this case was as follows:

> "At the core of the first claim contained in Plaintiffs' First Amended Complaint - and indeed of the entire action - is Plaintiffs' allegation that certain language in the notes and mortgage is ambiguous and further is subject to being interpreted to preclude any interest rate increases that total more than 1-1/2 percent."
>
> (Memorandum in Support of Motion, p. 14)

In their opposition, respondents reiterated their position as follows:

> "Plaintiffs assert that the clauses permit the Defendant HONOLULU FEDERAL to decrease or increase the total rate of interest on the loans for the duration of the term of the loan by a maximum of one and one-half percent (1-1/2%) per annum."
>
> (Plaintiffs' Memorandum In Opposition To Defendant's Motion For Summary Judgment filed May 28, 1982, p. 8)

By its order of November 2, 1982, the District Court dismissed Counts II and III and granted HonFed's motion for summary judgment on Count I holding that under the loan documents HonFed could increase the interest by 1.5% every three months, or 6% each year. (Pet. p. 6; Pet.App.A, 1a-8a)

Earlier, on May 19, 1982, respondents filed their motion for class certification which stated in part as follows:

> "Every member of the Plaintiff class alleges that the loan contract evidenced by the mortgage and promissory note is, at best, ambiguous and should be construed against the drafter."

(Plaintiffs' Motion For Class Certification, p. 7)

On December 22, 1982 HonFed moved for summary judgment on Counts IV and V and on January 20, 1983 respondents filed their cross-motion for summary judgment on Counts IV and V. By its order filed on May 6, 1983 (Appendix 1 hereto), the District Court granted HonFed summary judgment on Count V, granted respondents summary judgment on Count IV, certified the class with respect thereto, and awarded respondents costs and attorney's fees. Upon HonFed's motion for reconsideration, the court vacated its order as to Count IV, dissolved the class, and granted HonFed summary judgment on Count IV. (Pet.App.B, 9a-12a) It was from this order, which disposed of the last of the five counts, that respondents took their first appeal to the Ninth Circuit.

The Court of Appeals rendered its opinion on this first appeal on October 1, 1984. (Pet.App.B, 13a-16a) It held that under Hawaii law the terms of a promissory note and mortgage must be construed together and that "unclear language in a mortgage is resolved against the drafter." (*Id.* at 15a) Further, the court held that the phrase in the HonFed mortgages "on said note" was unclear and "ambiguous because 'there is a doubt' about its meaning." (*Ibid.*) Continuing,

> "The ambiguity in the mortgages and the variance between the language in the mortgages and the promissory notes make the home loan agreements 'susceptible to more than one meaning.' "
>
> (*Ibid.*)

The court concluded as follows:

> "Accordingly, the parties should be allowed to present extrinsic evidence to establish the terms of the home loan agreements."
>
> (*Ibid.*)[2]

In its petition for rehearing of this decision HonFed maintained that "Extrinsic evidence is inappropriate in this case" and that

> "Under the circumstances of this case, extrinsic evidence concerning the interpretation of the Mortgage would serve no purpose."
>
> (Petition for Rehearing dated October 12, 1984, pp. 11, 12)

Following remand the parties took depositions of several HonFed officials and of respondents concerning their understanding of the loan documents. As noted above, two HonFed officials testified that HonFed could raise the interest by only 1.5% each year. Following discovery HonFed again moved for summary judgment which the District Court granted by its order of August 11, 1986. (Pet.App.C, 17a-25a)

Respondents again appealed from this grant of summary judgment against them and while it is true that respondents did not cross-move for summary judgment, their briefs left no doubt that they contended the HonFed documents should have been construed in their favor.

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[2] This sentence in Appendix B contains an inadvertent elision. See the complete sentence quoted at the foot of 19a.

"*The District Court erred when it failed to interpret the ambiguities of the mortgage in favor of plaintiff borrowers* or to permit a jury to interpret the documents."

(Appellant's Opening Brief, p. 7. Emphasis supplied)

" . . . HonFed silently sidesteps the problem of the ambiguity and the mandate of this court that the ambiguity be resolved in Plaintiffs' favor, . . . "

(Appellants' Reply Brief, p. 4)

"The law of the case as set forth in the Court's prior opinion is that, without more, the ambiguity is to be resolved in the borrowers favor."

(*Id.* at p. 6)

In view of the Court of Appeals' first opinion, these assertions of respondents, and the contradictory testimony of HonFed's officers, it can come as no surprise that the Court of Appeals the second time around resolved the ambiguities against HonFed and in favor of respondents. (Pet.App.D, 26a-30a) The court held as follows:

"We now accordingly hold that the note read together with the mortgage was ambiguous; that the ambiguity is to be construed against the drafter; and that therefore the maximum permissible interest on the loan was a raise of 1-1/2 percent during the life of the loan."

(*Id.* at 29a)

REASONS FOR DENYING THE WRIT

A. Certiorari Should Not Issue Merely To Review Evidence And The Parties' Different Views Of That Evidence

Respondents submit that the challenged decision was correct as a matter of law. The ambiguity in the mortgages initially found by the Court of Appeals was compounded by HonFed's testimony upon remand creating an ambiguity in the meaning of the notes.

Unlike the defendants in *Fountain v. Filson*, 336 U.S. 681 (1949), HonFed has been apprised from the outset of respondents' theory and claim concerning construction of the loan documents and HonFed was afforded the opportunity to obtain and present evidence in support of its contrary interpretation. Indeed, it points to no additional evidence which it could present were the matter again remanded to the District Court.

But even if error were assumed, this Court "[does] not grant a certiorari to review evidence and discuss specific facts." (*United States v. Johnston*, 268 U.S. 220, 227 (1925)) It is abundantly clear that the challenged decision here turns on the particular facts and documents involved in this case and that review "would be of no importance save to the litigants themselves." (*Rudolph v. United States*, 370 U.S. 269, 270 (1962)) As stated in *Ross v. Moffitt*, 417 U.S. 600, 616, 617 (1974), review by this Court "is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

B. *Fountain v. Filson* Is Inapposite

Shorn of its plumage, HonFed's petition relies entirely upon *Fountain v. Filson, supra,* which is clearly distinguishable. There, the Filsons brought suit claiming a $6,000 interest in New Jersey realty on the theory of resulting trust. Fountain obtained summary judgment on the "sole basis" that New Jersey law did not permit imposition of a resulting trust under the circumstances. (336 U.S. at 682) The Court of Appeals agreed that no resulting trust could arise but directed entry of judgment in the Filsons' favor on the grounds that depositions taken in the action showed the existence of a personal obligation for the $6,000. This Court understandably reversed this judgment because

> "the order was made on appeal on a *new issue* as to which the opposite party had no opportunity to present a defense before the trial court."
>
> (*Id.* at 683. Emphasis supplied)

Continuing, the court observed that, unlike the instant situation

> "there was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by the court on her motion for summary judgment was the claim that there was a resulting trust."
>
> (*Ibid.*)

The situation here bears no resemblance to that before this Court in the *Fountain* case. Respondents have consistently pleaded and urged their claim that the loan documents limited interest increases to a maximum of

1.5%. Upon the occasion of its first motion for summary judgment, HonFed recognized this issue was "At the core of" respondents' entire action. The Court of Appeals in its first decision held that the mortgage was ambiguous and should be construed in respondents' favor but remanded to give HonFed the opportunity to obtain and offer evidence to establish the meaning of the notes and the mortgages. On the second appeal, respondents urged that the documents should be construed in their favor and after examining the evidence, the Court of Appeals agreed.

There was simply no "new issue," legal or factual, on the second appeal as to which HonFed had not had an opportunity to litigate and, significantly, HonFed fails to describe any evidence or point of law which was not before the trial court and the Court of Appeals. Accordingly, and in direct contrast to *Fountain*, no purpose would be served by once again remanding the issue to the District Court.

C. Summary Judgment In Favor Of A Non-Moving Party Is Not Erroneous Where The Moving Party Has Had The Opportunity To Litigate The Issue And No New Facts Would Be Developed On Remand

HonFed's depiction of the horrors which would supposedly ensue if the Ninth Circuit's decision is allowed to stand is vastly overdrawn if not wholly illusory. An inherent risk in moving for summary judgment is that the court will agree that there is indeed no genuine issue of

material fact but that the facts established dictate judgment for the other party. Accordingly, summary judgments in favor of the non-moving party are not unusual and have been repeatedly sanctioned by both federal trial and appellate courts. (See, 6 Moore's Federal Practice, ¶56.12; 6 Pt. 2 Moore's Federal Practice, ¶56.27[2]; 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 2720, pp. 28-35) As this Court recently recognized in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)

> "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence."

Typical of such cases and quite similar to the instant situation is *Potenze v. New York Shipping Ass'n., Inc.*, 804 F.2d 235 (2nd Cir. 1986), cert.den. 107 S.Ct. 1955 (1987), cited but not discussed by HonFed.

> "Summary judgment decided on submission is subject to plenary, *de novo* review. This court also has the power in appropriate circumstances to reverse the district court's grant of summary judgment and to grant summary judgment for the nonmoving party. This is appropriate when the issues have been fully developed, the opponent has had a full and fair opportunity to litigate the question, and no new facts would be developed on remand."
>
> (*Id.* at 239. Citations omitted)

Viger v. Commercial Ins. Co. of Newark, N.J., 707 F.2d 769 (3rd Cir. 1983), involved the interpretation of a document, there an insurance policy. Plaintiff's motion for summary judgment was granted by the district court and on appeal, the Third Circuit directed entry of summary

judgment in favor of defendant which had not moved. The court observed that

> "although Commercial did not file a cross-motion for summary judgment, which would have been the better practice, we will reverse the judgment for plaintiffs and direct the district court to enter summary judgment for defendant."
>
> (*Id.* at 774)

In *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982) the Ninth Circuit affirmed a summary judgment granted by the district court in favor of the non-moving defendant. The court observed as follows:

> "In the instant case, the parties had every opportunity to explore and expound the issues in the prayer for equitable relief and did so to the extent they deemed advisable."
>
> (*Id.* at 312)

A court is not precluded from granting summary judgment in favor of the non-moving party even though the latter "alleges that a genuine issue of fact remains for trial. . . ." (*Federal Deposit Ins. Corp. v. Sumner Financial Corp.*, 376 F.Supp. 772, 776 (M.D. Fla. 1974))

Here, as in the cited cases, the central issue in the case has been exhaustively developed and HonFed has had a full opportunity to litigate the question. For example, in its answering brief on the second appeal, it expended some 19 pages in analyzing the extrinsic evidence adduced by the parties concerning the documents in question. (Appellee Honolulu Federal Savings And Loan Association's Answering Brief served October 21, 1987, pp. 10-29) Petitioner has described no new issues or

facts which would be developed on remand. Accordingly, such remand would be an idle act and would result only in additional expense and further delay of this long-delayed litigation.

CONCLUSION

For the reasons set forth above it is submitted that the petition for certiorari be denied.

January 23, 1989

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HARRIS N. MURABAYASHI, et al., Plaintiffs, vs. HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association, Defendant.	CIVIL NO. 81-0423
HARRIS N. MURABAYASHI, et al., Plaintiffs, vs. HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association, Defendant.	CIVIL NO. 81-0459

ORDER

This action was brought by five plaintiffs who took out mortgage loans from the defendant in 1963 and 1964. This court has already ruled on Counts I through III of the plaintiffs' complaint. The parties have now filed cross motions for summary judgment on Counts IV and V, the only remaining Counts.

Count IV alleges that the defendant violated the Federal Truth in Lending Laws, including but not limited to 15 U.S.C. § 1639 (1982), and Sections 226.8(a) and (j) of Federal Reserve Board Regulation "Z", 12 C.F.R. 226.

Count V alleges that the defendant violated Section 480-2 of the Hawaii Revised Statutes, which prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce.

More specifically, plaintiffs allege that there are three discrepancies between their original promissory notes and the refinancing agreements sent out by the defendant in October 1981. First, plaintiffs allege that the promissory notes state that interest can be decreased as well as increased over time, whereas the refinancing statement fails to mention the possibility of decreased interest rates.

Second, plaintiffs allege that the promissory notes, by their terms, do not allow for the monthly payments on them to be raised, or the maturity date extended in any way.

Finally, plaintiffs contend that although this court's ruling establishes that the promissory notes allow interest to be increased up to 6% per year (as interpreted by this court), the refinancing statements only allow for a total increase of 1.5%. Plaintiffs also have a motion for class certification pursuant to Rule 23(c)(1), pending before this court. This court continued its ruling on plaintiffs' motion until it had ruled on defendant's motion to dismiss Counts II and III, and its motion for summary judgment on Count I. These motions were the subject of this court's November 2, 1982 Order.

At this time, a ruling on plaintiffs' motion for certification is appropriate so that the court's ruling regarding the remaining Counts in Plaintiffs' complaint will be applicable to all parties similarly situated. The court believes that there is enough detail in the pleadings and exhibits on file, along with the affidavits submitted by plaintiffs, to preclude the necessity of an evidentiary hearing on the matter of certification. *See Jones v. Diamond*, 519 F.2d 1090, 1098 (5th Cir. 1975). Consequently, IT IS HEREBY ORDERED that plaintiffs' motion for certification pursuant to Federal Rule of Civ. Proc. 23(a) and (b) be granted, and that the class be designated to include all those persons who have both of the following: (1) an outstanding promissory note whose terms are set forth on a form identical to that submitted as Exhibits A-C, attached to Plaintiffs' First Amended Complaint (filed with this court on April 21, 1982), and (2) a refinancing statement identical to those appended as Exhibits F and G to Plaintiffs' First Amended Complaint. The class is bound only by the court's ruling regarding the remaining allegations in the complaint.

The plaintiffs shall submit on or before May 17, 1983, a proposed form of notice consistent with the requirements of F.R.Civ.P. Rule 23(c)(2). The defendant shall submit its objections to the proposed form and suggestions for a proposed form of notice within ten (10) days thereafter.

In ruling on Count IV, it is necessary to consider each of the three discrepancies/misrepresentations alleged by plaintiffs. Plaintiffs' first allegations can be disposed of in defendant's favor because, as the defendant points out,

TILA speaks only of increases in payments and/or percentage rates. See 12 C.F.R. § 226.8 (b)(8) (1982).

Plaintiffs' second allegation can also be disposed of in defendant's favor. Although it is true that the original notes did not contain any terms regarding the right of the defendant to raise the amount of each payment and/or increase the number of payments, such adjustment is necessarily implied from the fact that the interest rate on the notes could be raised up to 6% per annum. Since this court has already ruled in its November 2, 1982 Order that the plaintiffs were charged with knowledge of that allowable percentage increase, plaintiffs must also be charged with knowledge that some sort of adjustment in the payment terms would have to be made should the interest rate be raised.

Notwithstanding the above holding, plaintiffs cannot be bound by the terms unilaterally imposed by the defendant. Since the promissory notes failed to include any specific provision for either an increase in number of payments or an increase in the amount of each payment upon raising of the interest, the defendant cannot now claim the right to choose the method by which the interest rate increase will be incorporated.

Consequently, IT IS HEREBY ORDERED that plaintiffs be allowed to choose the method by which the increase interest rates will be factored into their payment schedules. Plaintiffs must be afforded the option of either increasing the term of their note or increasing the amount of each scheduled payment.

Plaintiffs' third allegation requires that this court interpret the terms of the refinancing statements for the

first time. Plaintiffs contend that the refinancing terms differ from those of the original notes, and that the differences between the two agreements are material. Plaintiffs further argue that the plain meaning of the refinancing terms limits the increase in interest to 1.5%.

After careful review of the refinancing statement, this court concludes that its terms do differ from those contained in the notes originally issued to plaintiffs. The refinancing statement does not contain the words "from time to time thereafter," and the statement contains language stating that interest may be increased "by up to 1.5% per year." The above language is followed by a detailed description of how an increase of less than 1.5% would affect the borrower's payment schedule. This language would underscore a borrower's belief that increases were limited to 1.5%.

This court's original order interpreting the terms of the promissory notes relied heavily on wording in the notes stating that interest could be raised "from time to time thereafter," and that this periodic rise was above and beyond the interest "then in effect." (See p.7 of November 2, 1982 Order.) The failure of the refinancing statement to include the words "from time to time thereafter" is significant because it would justify a borrower's belief that the interest rate on his note could only be adjusted once during the term of the note.

For the above reasons, this court concludes that the plain meaning of the terms of the refinancing statement differs from that of the notes themselves.

The issue then becomes whether this difference is material and constitutes a violation of TILA and § 480-2

of the Hawaii Revised Statutes. In *Dixey v. Idaho First Nat. Bank*, 677 F.2d 749 (9th Cir. 1982), the Ninth Circuit addressed the issue of materiality in discussing the purpose and coverage of the Truth in Lending Act:

> The Act requires disclosure of credit terms to consumers so that potential borrowers will be able to compare the available costs of credit. The most important disclosures mandated by the Act are those upon which consumers should compare competing loans, the finance charge and annual percentage rate . . . "[T]he most important information in a credit purchase is that which explains the differing net charges and rates."

Id., 677 F.2d at 751 (Citations omitted.)

The *Dixey* court language makes it clear that discrepancies and nondisclosures regarding the interest rate applicable to a loan cannot be considered de minimus. Thus, plaintiffs are entitled to redress under the Act.

As to Count V, summary judgment must be rendered in defendant's favor. As a matter of law, plaintiffs cannot show that the defendants intended to fraudulently induce them into paying finance charges in excess of those called for under their respective notes. This court has already ruled that defendant's interpretation of the allowable increases in interest is valid. The mere fact that defendant subsequently issued to borrowers a refinancing statement which allows for only 1.5% increases is insufficient to give rise to a cause of action under Haw. Rev. Stat. § 480.2. Plaintiffs did not rely on this statement in entering into the agreements with Honolulu Federal. They cannot show any injury to their business or property by virtue of the discrepancies between the notes and the

Refinancing Statement. Consequently, plaintiffs fail to meet the standing requirements of § 480.13.

The viability of Count V required a determination by this court that the language in the notes themselves limited the permissable increase in interest to 1.5% (See ¶ 71 of Plaintiff's First Amended Complaint) Given this court's November 2, 1982 Order holding otherwise, Count V must fail.

DAMAGES

Plaintiffs seek declaratory relief and statutory damages as provided under 15 U.S.C. § 1640. In the case of a class action, no minimum recovery is applicable, and the court must consider a number of factors in determining the appropriate damages. Those factors include the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons intentionally affected, and the extent to which the creditor's failure of compliance was intentional. The evidence before the court at this time is insufficient to determine whether an award of damages under 15 U.S.C. § 1640(a) is appropriate, and if so, the amount of such award. The parties are therefore instructed to submit further evidence and authority addressing the issue of actual damages within the context of a class action.

Plaintiffs are entitled to an award of costs and attorneys fees under 15 U.S.C. § 1640(a)(2). See *Hannon v. Security Nat. Bank*, 537 F.2d 327 (9th Cir. 1976). Defendants are hereby ordered to pay such reasonable fees and costs as can be shown to have been incurred by plaintiffs in the prosecution of this action.

Finally, under the power vested in this court by 28 U.S.C. § 2202 (1982), this court hereby orders defendant, on or before May 17, 1983, to submit a proposed draft to this court and opposing counsel of a notice to class members containing a clear description of the permissible interest rate increase and the methods by which each class member may choose to have such potential increase incorporated into his payment schedule. Plaintiffs shall have seven (7) days thereafter to file any objections or suggestions thereto.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 5, 1983.

/s/ Martin Pence
UNITED STATES DISTRICT JUDGE